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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1929.

THE UNITED STATES,

Petitioner,

v.

AMERICAN CAN COMPANY.

THE UNITED STATES,

Petitioner,

v.

MISSOURI CAN COMPANY.

THE UNITED STATES,

Petitioner,

v.

DETROIT CAN COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.



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BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

The petition for writs of certiorari does not state correctly the grounds upon which these suits are based and does not state fully the facts which are established by the record.

These suits were brought in the District Court for New Jersey under Paragraph 20 of Section 24 of the Judicial Code,

as amended by the Revenue Acts of 1921 and 1925, to recover income and excess profits taxes for 1917 which the plaintiffs paid in excess of the amounts which were legally payable. They were tried by the Court without a jury.

The petitions of the plaintiffs were filed and served on January 22, 1926 (R. pp. 2, 28, 193, 201, 227, 236), and the answers of the defendant were filed by the United States Attorney on April 28, 1926 (R. pp. 29, 202, 237). The answers admitted most of the allegations of the petitions. The plaintiffs introduced evidence at the trial to establish the allegations which were denied by the answers and the defendant offered no evidence to controvert that introduced by the plaintiffs. The Court handed down a memorandum decision (R. pp. 160-5) and also made special findings of fact and conclusions of law (R. pp. 174-81, 210-14, 246-9). He found all the facts which were admitted by the pleadings and also additional facts which were established by the undisputed evidence.

The only question involved in these suits is with reference to the amounts of the incomes upon which the taxes should be computed. The Revenue Act of 1917 provided in substance that the net income of every taxpayer should be ascertained upon the basis of actual receipts and disbursements, and that the tax should be computed upon the net income "as thus ascertained", except in cases where a taxpayer kept his (or its) accounts and made his (or its) return upon some other basis which clearly reflected his (or its) income and complied with regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, and provided that in such excepted cases the tax should be computed upon his (or its) income "as so returned" (Rev. Act of 1917, Secs. 1, 5, 6, 8(*a*) and 8(*g*) with respect to individuals, and Secs. 10, 12, 13(*a*) and 13(*d*) with respect to corporations).

The plaintiffs kept their accounts and made their returns for 1917 upon a basis which did not clearly reflect their incomes and did not comply with the regulations made by the Commissioner, with the approval of the Secretary of the

Treasury. The Commissioner ruled and determined that the basis used by the plaintiffs did not clearly reflect their incomes and was not authorized or permitted by the Revenue Act or the regulations made thereunder, and that their incomes should not be determined upon such basis. He thereupon redetermined their incomes and reassessed their taxes upon a basis which was different from the basis used by the plaintiffs and also different from the basis of actual receipts and disbursements prescribed in the Revenue Act.

The incomes of the plaintiffs upon the basis of actual receipts and disbursements were less by several million dollars than their incomes as returned by them, and the taxes which were payable upon the basis of actual receipts and disbursements were less by several million dollars than the taxes which the plaintiffs actually paid.

The plaintiffs contend that their taxes should be computed upon the basis of actual receipts and disbursements and that they are entitled to recover the amounts of the taxes which they paid in excess of the amounts which were payable upon that basis.

The defendant contends that the taxes should be computed upon the basis upon which the Commissioner finally redetermined the incomes, and that the plaintiffs are not entitled to recover any amounts of the taxes which they paid.

The question is whether the taxes of the plaintiffs should be computed upon the basis prescribed by Congress in the Revenue Act or upon some other basis prescribed by the Commissioner without any authority from Congress.

There was no dispute at the trial with respect to any question of fact. All the material facts are established by the pleadings or the evidence, and by the findings of the District Court. The decisions of the District Court and the Circuit Court of Appeals (20 Fed. (2nd) 970; 31 Fed. (2nd) 730) are in strict accordance with the Revenue Act and the decisions of this Court, and there is no decision of any Court which holds or indicates that a different result should have been reached.

The provisions of the Revenue Act of 1917 with respect to the determination of the income are entirely different from the provisions of the later Revenue Acts with respect to the determination of the incomes for 1918 and subsequent years. The decision in these suits has no bearing upon, or relation to, the determination of the taxes of these plaintiffs for any year other than 1917, or the determination of the taxes of any other taxpayers for any year, or the future conduct of the Commissioner in the administration of the Revenue Acts. It is of no importance to anybody except the parties to the suits.

The italics used in this brief, including those in quoted passages, are in all cases our own.

Statement of the Case.

The facts which were found by the District Court, including those which are admitted by the pleadings, with references to the pleadings or evidence by which they are supported, are substantially as follows:

The plaintiffs are corporations organized under the laws of New Jersey engaged in the business of manufacturing and selling cans and other containers and having their principal business offices in the City of New York (petitions, pp. 2-3, 193, 227-8, answers, pp. 29, 202, 237).

Prior to March 1921 William H. Edwards was the Collector of Internal Revenue of the United States for the Second District of New York, the district in which the plaintiffs had their principal places of business. Edwards was not in office as such Collector at the time of the commencement of these suits, but since March 1921 Frank K. Bowers was the Collector of Internal Revenue for the Second District of New York (petitions, pp. 3, 193-4, 228, answers, pp. 29, 202, 237).

The plaintiffs and their domestic affiliated corporations *kept their accounts* during 1917 *upon the basis of* accruing their receipts and disbursements, *valuing the normal stocks*

of tin plate carried in their inventories at a constant figure regardless of changes in the cost or market value of tin plate, and valuing the other materials carried in their inventories at cost or market value, whichever was lower, with the presumption that the materials in the inventory were those last purchased (findings, pp. 174-5, 211-2, 246-7, evidence, pp. 56-8).

The plaintiffs and their domestic affiliated corporations *determined their incomes and made their Federal income and excess profits tax returns for 1917 upon the basis upon which their accounts were kept.* Said returns were filed in March, 1918 with Edwards, the Collector of Internal Revenue for the Second District of New York. The amount of the net income of the American Can Company as so determined and returned was $16,927,404.35 (including $60,010.50 as dividends upon the stock of other domestic corporations). The amount of the net income of the Missouri Can Company as so determined and returned was $253,559.18. The amount of the net income of the Detroit Can Company as so determined and returned was $104,786.64. The amount of the consolidated net income of the plaintiffs and their domestic affiliated corporations as so determined and returned was $17,994,400.46 (including $60,010.50 as dividends upon the stock of other domestic corporations) (findings, pp. 175, 212, 247, evidence, pp. 61, 104, 106, 112, 121).

On or about June 14, 1918 the American Can Company paid and Edwards collected $3,266,499.86 as and for the income taxes for 1917 payable by the American Can Company and the excess profits tax for 1917 payable by the plaintiffs and their domestic affiliated corporations, the Missouri Can Company paid and Edwards collected $15,213.54 as and for the income taxes for 1917 payable by the Missouri Can Company, and the Detroit Can Company paid and Edwards collected $6,287.19 as and for the income taxes for 1917 payable by the Detroit Can Company, in accordance with the returns filed by them respectively. The total amount of the excess profits tax was allocated to and paid by the American Can Company as the parent corporation (findings, pp. 175, 212, 247, evidence, pp. 59-60, 100-2).

After June 14, 1918 and prior to September 21, 1920 the Commissioner of Internal Revenue made assessments against the American Can Company for additional income and excess profits taxes for 1917, aggregating $1,953,480.79. The American Can Company paid and Edwards collected $520,762.54 on or about November 22, 1919 and $1,432,718.25 on or about September 21, 1920 as and for such additional taxes (findings, p. 176, petition, pp. 4-5, answer, p. 29).

Thereafter the *Commissioner of Internal Revenue objected to the basis upon which the plaintiffs and their domestic affiliated corporations had valued their inventories of tin plate and determined their net incomes for 1917,* stated in substance that such basis was not correct, *undertook to revalue their inventories of tin plate and redetermine their net incomes upon a different basis* and made assessments for additional income and excess profits taxes for 1917 aggregating $3,397,791.46 (petitions, pp. 5-6, 195, 229-30, answers, pp. 29, 202,237).

Thereafter the plaintiffs filed with Bowers, as Collector of Internal Revenue, claims for the abatement of said assessments aggregating $3,397,791.46 and also claims for the refund of portions of the taxes which they had paid on June 14, 1918, November 22, 1919 and September 21, 1920. On and after January 26, 1924 the Commissioner disallowed and rejected said claims for abatement and said claims for refund and thereafter the plaintiffs paid to Bowers, as Collector of Internal Revenue, the amounts of the assessments involved in said claims for abatement, with interest, and brought actions against said Bowers in the District Court of the United States for the Southern District of New York to recover back the amounts so paid. Said actions are still pending undetermined (petitions, pp. 6-7, 195-7, 230-1, answers, pp. 29, 202, 237).

The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, made regulations which provided that all materials carried in inventories should be valued on the basis of (a) cost, or (b) cost or market value,

whichever was lower, with the presumption that the materials in the inventory were those last purchased. *The basis upon which the plaintiffs and their domestic affiliated corporations kept their accounts and made their returns for 1917 was not in accordance with said regulations. The Commissioner ruled and determined that the basis upon which the plaintiffs and their domestic affiliated corporations valued their inventories of tin plate and determined their net incomes for 1917 did not clearly reflect their incomes and was not authorized or permitted by the Revenue Act of 1917 or the regulations made thereunder, that their incomes for 1917 should not be determined upon the basis upon which they kept their accounts and made their returns and that their income and excess profits taxes for 1917 should not be computed upon their incomes as returned* (petitions, pp. 8-9, 198, 232-3, answers, pp. 29, 202, 237).

The Commissioner of Internal Revenue ruled and determined that the basis upon which the plaintiffs and their domestic affiliated corporations kept their accounts and made their income and excess profits tax returns for 1917 did not clearly reflect their incomes, that their incomes for 1917 should not be determined upon such basis and that their income and excess profits taxes for 1917 should not be computed upon their incomes as returned (findings, pp. 176, 212, 247).

The net income of the American Can Company for 1917, determined upon the basis of actual receipts and disbursements prescribed in the Revenue Act of 1917, was $12,754,886.02 ($60,010.50 thereof being dividends upon the stock of other domestic corporations). The net income of the Missouri Can Company for 1917, determined upon such basis was $124,164.87. The net income of the Detroit Can Company for 1917, determined upon such basis was $6,556.48. The consolidated net income of the American Can Company and its domestic affiliated corporations for 1917, determined upon such basis was $13,231,054.52 ($60,010.50 thereof being dividends upon the stock of other domestic corporations) (findings, pp. 176-80, 212-3, 247-8, evidence, pp. 61-8, 75-8, 128-46, 151-2).

The total amount of the Federal income taxes for 1917 payable by the American Can Company upon $12,754,886.02 of net income ($60,010.50 thereof being dividends upon the stock of other domestic corporations) and of the Federal excess profits tax for 1917 payable by the American Can Company and its domestic affiliated corporations upon $13,231,054.52 of consolidated net income ($60,010.50 thereof being dividends upon the stock of other domestic corporations) was $2,514,478.94 (findings, p. 180, evidence, pp. 79, 153).

The amount of the Federal income taxes for 1917 payable by the Missouri Can Company upon $124,164.87 of net income was $7,449.87 (findings, p. 213, evidence, pp. 70, 149).

The amount of the Federal income taxes for 1917 payable by the Detroit Can Company upon $6,556.48 of net income was $393.39 (finding, p. 248, evidence, pp. 70, 150).

No part of the amounts which the plaintiffs, or any of them, had paid or which Edwards collected as and for income taxes for 1917 has been refunded or repaid or credited against any income, war profits or excess profits tax or instalment thereof due or payable by the plaintiffs, or any of them (findings, pp. 180, 214, 248-9, evidence, pp. 70-1).

The conclusions of law found by the District Court were that the plaintiffs had paid and that Edwards, as Collector of Internal Revenue, had collected from the plaintiffs, $2,705,501.71 in the case of the American Can Company, $7,763.65 in the case of the Missouri Can Company, and $5,893.80 in the case of the Detroit Can Company, in excess of the amounts which were legally payable and collectible as and for Federal income and excess profits taxes for 1917, that said amounts were assessed and collected erroneously, illegally, wrongfully and without authority and that the plaintiffs were entitled to judgments for said amounts with interest at the rate of 6% per annum from the dates of payment (pp. 181, 214, 249).

The Revenue Act of 1917.

The Acts of Congress which imposed and determined the amounts of the Federal income and excess profits taxes for 1917 were the Revenue Act approved September 8, 1916 (39 Stat. 756, c. 463), and the Revenue Act approved October 3, 1917 (40 Stat. 300, c. 63). These two Acts, taken together, constitute the Revenue Act of 1917. The Act of October 3, 1917, continued some of the provisions of the Act of September 8, 1916, amended some of its provisions and added some new provisions. The Revenue Acts of 1909, 1913 and 1916 imposed only taxes based upon the amount of the income. The Act of 1917 increased the rates of the income tax and added an excess profits tax based upon the amount of the invested capital and the amount of the income.

There is no doubt that the Revenue Act of 1917 prescribes the basis of actual receipts and disbursements, or the "cash" basis, as the primary basis for determining the amount of the income subject to the income and excess profits taxes. This basis is prescribed and defined in the Act with respect to both individuals and corporations. No other basis for determining income is prescribed or defined in the Act.

The only provisions of the Revenue Act of 1917 which authorize the computation of taxes upon any amounts other than the incomes determined on the cash basis, are Sections 8(*g*) and 13(*d*). The language of these two sections is exactly the same, except that the former applies to individuals and the latter to corporations.

These sections, 8(*g*) and 13(*d*), appeared for the first time in the Revenue Act of 1916. The Revenue Acts of 1909 and 1913 prescribed the cash basis for determining the amount of the income and did not authorize or permit taxpayers to make their returns upon any other basis.

The purpose of these new sections was to enable taxpayers who kept books upon bases other than the cash basis to make returns upon the basis of their books in cases where

the books clearly reflected the income, and to relieve such taxpayers from the burden of redetermining their incomes upon the cash basis. Their purpose was to grant a privilege to the taxpayers rather than to confer additional powers upon the Commissioner.

Section 10(*a*) of Title I of the Revenue Act of 1917 imposes an income tax "upon the total net income *received* * * * by every corporation".

Section 201 of Title II of the Revenue Act of 1917 imposes an excess profits tax upon the income of every corporation, and Section 206 of the same Title provides that "for the purposes of this Title the net income of a corporation shall be *ascertained* and *returned* * * * for the taxable year upon the same basis and in the same manner as provided in Title I" of the Revenue Act of 1917.

Section 12 of Title I of the Revenue Act of 1917, so far as is material, reads as follows:

> "Section 12(*a*). In the case of a corporation, joint-stock company or association, or insurance company, organized in the United States, such net income shall be ascertained by deducting from *the gross amount of its income received within the year* from all sources—
>
> First. All the ordinary and necessary expenses *paid within the year* in the maintenance and operation of its business and properties, including rentals or other payments required to be made as a condition to the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity.
>
> Second. All losses *actually sustained and charged off within the year* and not compensated by insurance or otherwise, including a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade; * * *
>
> Third. The amount of interest *paid within the year* on its indebtedness (except on indebtedness incurred for the purchase of obligations or securities the interest upon which is exempt from taxation as income under this title) to an amount of such indebtedness not in excess

of the sum of (*a*) the entire amount of the paid-up capital stock outstanding at the close of the year, or, if no capital stock, the entire amount of capital employed in the business at the close of the year, and (*b*) one-half of its interest-bearing indebtedness then outstanding. * * *

Fourth. Taxes *paid within the year* imposed by the authority of the United States (except income and excess profits taxes), or of its Territories, or possessions, or any foreign country, or by the authority of any State, county, school district, or municipality, or other taxing subdivision of any State, not including those assessed against local benefits."

Section 13(*a*) of Title I provides that "the tax shall be computed upon the net income, *as thus ascertained,* received within each preceding calendar year", etc., obviously referring to the basis for ascertaining net income which is prescribed in Section 12.

Section 13(*b*) of Title I provides that "every corporation * * * subject to the tax herein imposed shall, on or before the first day of March, * * * render a true and accurate return of its annual net income in the manner and form to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, and containing such facts, data and information as are appropriate and, in the opinion of the Commissioner, necessary to determine the correctness of the net income returned and to carry out the provisions of this Title I".

Section 13(*d*) of Title I reads as follows:

"(*d*) A corporation, joint-stock company or association, or insurance company, keeping accounts *upon any* basis other than that of actual receipts and disbursements, unless such other basis does not clearly reflect *its* income, *may*, subject to regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, make *its* return *upon* the basis *upon* which *its* accounts are kept, *in which case,* the tax shall be computed upon *its* income *as so returned.*"

Section 14(*a*) of Title I provides that "all assessments shall be made and the several corporations * * * shall

be notified of the amounts for which they are respectively liable on or before the first day of June of each successive year, and said assessment shall be paid on or before the fifteenth day of June * * * except in cases of refusal or neglect to make a return and in cases of *erroneous,* false or fraudulent returns, in which cases the Commissioner of Internal Revenue *shall,* upon the discovery thereof, at any time within three years after said return is due, *make a return* upon information obtained as provided for in this Title or by existing law; and the assessment made by the Commissioner of Internal Revenue *thereon* shall be paid by such corporation * * * immediately upon notification of the amount of such assessment; * * *"

Section 14(*b*) of Title I provides that "when the assessment shall be made, as provided in this Title, the returns, together with any corrections thereof which may have been made by the Commissioner, shall be filed in the office of the Commissioner of Internal Revenue".

Section 13, including all its subdivisions, appears in the Revenue Act under the heading "Returns", and Section 14, including all its subdivisions, appears in the Revenue Act under the heading "Assessment and Administration". It cannot be presumed that provisions of this character are intended to impose a tax or to affect in any way the substantive provisions of the Act which do impose the tax.

Reinecke v. *Gardner,* 277 U. S. 239, 242-4.

Sections 13(*b*), 14(*a*) and 14(*b*) are purely administrative and they do not affect or qualify in any way the substantive provisions of the Act with respect to the determination of the income and the computation of the tax. These sections do not authorize the Commissioner to make an additional assessment or to make a "correction" of a return unless he makes a new return. The procedure clearly outlined in cases where no return is made or an erroneous return is made, is for the Commissioner to obtain the necessary information and make the return which the Revenue Act *required* the corporation to make, and to make an additional

assessment "thereon". The "corrections" of returns to which reference is made in Section 14(*b*) include only the "corrections" which the Commissioner is authorized to make by making new returns.

It is clear beyond question that in making a return and determining the amount of the income to be stated therein, the Commissioner is bound to follow the substantive provisions of the Act with respect to the determination of the income. There are no provisions in the Act with respect to the determination of the income other than those to which we have already referred.

Section 13(*d*) qualifies Section 12 and Section 13(*a*) to the extent, and only to the extent, that it is inconsistent with them, and it withdraws from Section 12 and Section 13(*a*) those cases, and only those cases, which fall clearly within its terms. Section 12 and 13(*a*) state the general rule. Section 13(*d*) creates an exception. All cases which do not fall clearly within the terms of an exception are necessarily governed by the general rule, and all cases which do not fall clearly within the terms of Section 13(*d*) are necessarily governed by Section 12 and Section 13(*a*).

The only cases which fall within the terms of Section 13(*d*) are cases where a corporation keeps its accounts and makes its return upon a basis which clearly reflects its income and complies with the Regulations, made by the Commissioner, with the approval of the Secretary of the Treasury. If the basis used or the return made does not clearly reflect the income or does not comply with the Regulations, Section 13(*d*) does not apply and the tax should not be computed upon the income "as so returned".

The Revenue Act does not authorize the Commissioner to compute the tax upon anything other than (*a*) the income determined upon the cash basis (Secs. 12 and 13(*a*)), or (*b*) the income "as so returned" (Sec. 13(*d*)). It clearly provides that the income must be determined upon the cash basis except in a case which falls within the terms of Sec. 13(*d*). If a case falls within the terms of Section 13(*d*),

the tax must be computed upon the income as so returned. If a case does not fall within the terms of Section 13(*d*), the tax must be computed upon the cash basis prescribed in Section 12.

The Cases of the Plaintiffs are Governed by Sections 12 and 13(a).

The cases of these plaintiffs do not fall within the terms of Section 13(*d*), because they kept their accounts and made their returns upon a basis which did not clearly reflect their incomes and did not comply with the regulations made by the Commissioner, with the approval of the Secretary of the Treasury. The plaintiffs did not make returns in accordance with Section 13(*d*), and they could not possibly have made returns in accordance with that Section. No corporation could make a return in accordance with Section 13(*d*) unless it kept its accounts upon a basis which clearly reflected its income and complied with the Regulations. It follows necessarily that the cases of these plaintiffs are governed by Sections 12 and 13(*a*).

The mandate of the Revenue Act which applies in these cases is not the provision of Section 13(*d*) that "the tax shall be computed upon its income as so returned", but rather the provision of Section 13(*a*) that "the tax shall be computed upon the net income as thus ascertained", i. e., the net income determined upon the cash basis prescribed in Section 12.

It is obvious that the returns which the plaintiffs made were erroneous and that the Revenue Act *authorized and required* the Commissioner to make new returns for them. Section 14(*a*) provides specifically that in every case of an erroneous return the Commissioner "*shall* * * * make a return" etc. It is also obvious that the returns which the Revenue Act thus *authorized and required* the Commissioner to make could be none other than the returns which the Revenue Act *authorized and required* the plaintiffs to make, and that the only returns which the Revenue Act *authorized or*

required the plaintiffs to make were returns upon the cash basis prescribed in Section 12.

Even in a case where a corporation kept its accounts upon a basis which clearly reflected its income and complied with the regulations, and accordingly had the right to make a return under Section 13(*d*), the Revenue Act did not *require* it to make such a return or authorize the Commissioner to make such a return for the corporation.

The defendant admits that the taxes should be computed upon the cash basis in every case where a corporation kept its accounts or made its return upon a basis which did not clearly reflect its income, and also admits that the returns made by the plaintiffs did not clearly reflect their incomes, but the defendant claims that there is no finding to the effect that the basis used by the plaintiffs did not clearly reflect their incomes (Petition for certiorari, pp. 21-2). The defendant admits and asserts, however, that the basis upon which the plaintiffs valued their inventories was in conflict with the Regulations (Petition for certiorari, p. 14). The defendant does not anywhere contend that the basis upon which the plaintiffs kept their accounts and made their returns did clearly reflect their incomes or that their taxes should be computed upon their incomes "as so returned".

The ultimate question to be determined is whether the taxes of the plaintiffs should be computed upon their incomes "as so returned" or upon their incomes determined upon the cash basis prescribed in Section 12, and the findings of fact show conclusively that the taxes should not be computed upon the incomes "as so returned" and accordingly should be computed upon the incomes determined upon the cash basis.

In the first place the findings show that the basis upon which the plaintiffs kept their accounts and made their returns was not in accordance with the regulations which the Commissioner made, with the approval of the Secretary of the Treasury, with respect to the valuation of inventories. This fact was admitted by the pleadings (R. pp. 8-9, 29, 198, 202, 232, 237), and the Court found that all the facts admitted by the pleadings were true (R. pp. 174, 211, 246). This

fact was also included in the findings which the defendant requested the District Court to make (R. pp. 171, 208, 243). The only purpose of these Regulations was to prescribe the basis or bases for valuing inventories which clearly reflected the income and could be used for tax purposes. The fact that the basis used by the plaintiffs was not in accordance with the regulations shows conclusively that the cases of the plaintiffs did not fall within the terms of Section 13(*d*) and that their taxes should not be computed upon their incomes "as so returned".

In the second place, the findings show that the Commissioner ruled and determined that the basis used by the plaintiffs did not clearly reflect their incomes and was not authorized or permitted by the Revenue Act or the regulations made thereunder, and that their incomes should not be determined upon such basis. This fact was admitted by the pleadings (R. pp. 8-9, 29, 198, 202, 232-3, 237) and also found by the District Court (R. pp. 176, 212, 247). This ruling and determination was in strict accordance with the regulations and the Commissioner could not have made any other ruling or determination without overruling himself and the Secretary of the Treasury. This ruling and determination was made by the Commissioner in the performance of his duties under the Revenue Act, it was within the scope of his authority and was entirely proper and correct. There is no doubt that it was conclusive and binding upon both the plaintiffs and the defendant. The fact that the Commissioner made such ruling and determination shows conclusively that the cases of the plaintiffs did not fall within the terms of Section 13(*d*) and that their taxes should not be computed upon their incomes "as so returned".

The principles which are involved in the interpretation of the findings are well settled by the decisions of this Court.

United States v. *Pugh,* 99 U. S. 265;
Sun Mutual Ins. Co. v. *Ocean Ins. Co.,* 107 U. S. 485;
The Belgenland, 114 U. S. 355;
United States v. *California & Oregon Land Co.,* 148 U. S. 31;
Winton v. *Amos,* 255 U. S. 373.

The defendant seems to be under the impression that these suits and the decisions in favor of the plaintiffs are dependent upon the question whether the action of the Commissioner amounted to a rejection of the basis used by the plaintiffs and that the plaintiffs would not have been entitled to recover if the Commissioner had not taken such action. This impression is wholly erroneous. The plaintiffs would have had the same right to recover even if the Commissioner had taken no action with respect to their returns. The basis of the recovery is the fact that the returns which were made were not in accordance with the Revenue Act and the taxes which were paid were in excess of the taxes which were legally payable.

The defendant argues that the Commissioner did not in fact reject the basis upon which the plaintiffs kept their accounts and made their returns, but that he merely corrected the returns so as to make them conform to that basis (Petition for certiorari, p. 18). The defendant admits that the basis upon which the plaintiffs valued their inventories was in conflict with the Regulations and that the Commissioner adjusted the inventory accounts so as to make them comply with the Regulations (Petition for certiorari, p. 14), but argues that this change in the basis for valuing the inventories did not involve a change in the basis upon which the accounts were kept or the returns were made (Petition for certiorari, pp. 16-18).

We have already pointed out that the question whether the Commissioner rejected the basis used by the plaintiffs is not of controlling importance, but it is obvious that the ruling and determination of the Commissioner to the effect that the basis used by the plaintiffs did not clearly reflect their incomes or comply with the Regulations and that their incomes should not be determined upon such basis amounted to, and was in fact, an unequivocal rejection of the basis. It is hard to see how the Commissioner could have done anything which would have been a more clear rejection of the basis used by the plaintiffs.

Furthermore, the pleadings and the findings establish the fact that the basis used by the Commissioner was different

from the basis used by the plaintiffs. The pleadings admitted that the Commissioner *objected to the basis* upon which the plaintiffs valued their inventories and determined their incomes, and that he undertook to revalue their inventories and redetermine their incomes *upon a different basis* (R. pp. 5-6, 29, 195, 202, 229, 237), and the District Court found that all the facts admitted by the pleadings were true (R. pp. 174, 211, 246).

It is obvious that this change in the basis for valuing the inventories did involve a change in the basis upon which the accounts were kept and the returns were made. The word "basis" as used in Section 13(*d*) cannot mean anything other than a basis or method for determining the income. The basis of actual receipts and disbursements referred to in this Section is the basis or method for determining the income which is prescribed in Section 12. Section 13(*d*) relates only to returns of income, and the word "basis" as used in this Section relates only to the determination of the income.

The basis upon which the accounts are kept or the return is made includes every process and every method which is used in determining any factor which affects the amount of the income. It is not limited to the basic theory or principle of cash or accrual which may underlie the entire accounting system, but it includes every theory and every principle which is involved in any part of the accounting system.

Section 13(*d*) clearly recognized that there was more than one form or kind of an accrual basis, because it recognized that there was more than one form or kind of a basis other than the cash basis. There are no bases other than the cash basis, except those which involve the principle of accruing receipts and disbursements. Section 13(*d*) further recognized that some forms or kinds of an accrual basis would clearly reflect the income and that others would not.

The basis upon which any particular corporation keeps its accounts or makes its return means the particular basis for determining the income which that particular corporation uses in keeping its accounts or making its return. If the corporation uses an accrual basis it means the particular

form or kind of an accrual basis which that particular corporation actually uses.

It is obvious that if inventories are used in connection with any accounting system, the basis upon which, and method by which, the inventories are valued is an essential part of the accounting system. It is also obvious that as there are several different bases or methods for valuing inventories in connection with an accrual basis of accounting for income, there must be several different forms or kinds of an accrual basis. To say that an accrual basis with inventories valued upon one basis is the same as an accrual basis with inventories valued upon a different basis is absurd upon its face. Any change in the basis upon which the inventories are valued must involve a change in the basis upon which the income is determined, and consequently a change in the basis upon which the accounts are kept and the return is made.

The basis for valuing inventories which the plaintiffs used was the basis of valuing the normal stocks of tin plate at a constant figure regardless of cost or market value, and of valuing the other materials carried in the inventories at cost or market value, whichever was lower (R. pp. 56-8, 174-5, 211-2, 246-7). This is admitted by the defendant (Petition for certiorari, p. 14).

On December 19, 1917, the Commissioner, with the approval of the Secretary of the Treasury, issued a Regulation to the effect that inventories "must be taken either (*a*) at cost, or (*b*) at cost or market whichever is lower" (T. D. 2609, Petition for certiorari, p. 11). This was the first regulation which was issued with respect to the valuation of inventories, and it is clear that it prohibited the plaintiffs from making their returns for 1917 upon the basis upon which they kept their accounts. In the latter part of 1919 the Advisory Tax Board, which had been created by the Commissioner for the purpose of passing upon questions arising under the Revenue Acts, considered carefully the nature and effect of several different bases for valuing inventories, including the basis of valuing normal or

base stocks of materials at a constant figure regardless of cost or market value, and ruled that the only bases for valuing inventories which clearly reflected the income and could be used for tax purposes were (a) the basis of cost, and (b) the basis of cost or market value, whichever was lower. (T. B. R. 48, 1 Cum. Bul. 47, T. B. R. 65, 1 Cum. Bul. 51).

In *T. B. R.* 65, the Advisory Tax Board said in part:

> "The question is raised as to whether under the Revenue Acts of 1917 and 1918 the so-called "base stock," "minimum," or "cushion," hereinafter referred to as "base stock," method of taking inventories may be used."
>
> * * * * * *
>
> "According to the base-stock method of taking inventories a manufacturer or dealer values at the same price year after year the minimum quantity of goods which he must have on hand at all times."
>
> * * * * * *
>
> "The Advisory Tax Board is of opinion, therefore, that neither the base stock method of taking inventories nor the moving average method, nor a method based upon the presumption that goods in the inventory are the earliest purchases, is in conformity with the provisions of the Revenue Act of 1917 or of the Revenue Act of 1918, and recommends that no change be made in the present regulations with respect to the method of taking inventories."

The fundamental and controlling facts are that the basis upon which the plaintiffs kept their accounts and made their returns, and the returns which they made, did not clearly reflect their incomes and did not comply with the Regulations. These facts are established conclusively by the record and no amount of argument can change them. It follows necessarily that the cases of these plaintiffs do not fall within the terms of Section 13(*d*), that their taxes should not be computed upon their incomes "as so returned", that the cases of these plaintiffs are governed by Sections 12 and 13(*a*) and that their taxes should be computed upon the cash basis

prescribed in Section 12. The returns which the plaintiffs made were erroneous, and the taxes which the plaintiffs paid were in excess of the taxes which were legally payable.

It is well settled that an erroneous return is not binding upon the taxpayer any more than upon the Government, and that if a taxpayer pays an amount of taxes in excess of the amount which was legally payable he has the right to recover back the excess, regardless of the reason for the overpayment, and regardless of whether it was made voluntarily or under protest or duress.

Revenue Act of 1916, 39 Stat. 756 c. 463, Sec. 14(a);

Revenue Act of 1918, 40 Stat. 1057 c. 18, Sec. 252;

Revenue Act of 1921, 42 Stat. 227 c. 136, Sec. 252;

Revenue Act of 1924, 43 Stat. 253 c. 234, Sec. 281(a), Sec. 1014;

Revenue Act of 1926, 44 Stat. 9 c. 27, Sec. 284, Sec. 1122(c);

Judicial Code, as amended Feb. 24, 1925, Sec. 24, par. 20;

U. S. v. *Hvoslef,* 237 U. S. 1;

Capewell Horseshoe Nail Company v. *Walsh,* 1 Fed. 2nd 818 (D. C. Conn.); 4 Fed. 2nd 991 (C. C. A., 2nd Cir.);

Beatty v. *Heiner,* 10 Fed. 2nd 390 (D. C. Pa.);

Warner v. *Walsh,* 24 Fed. 2nd 449 (D. C. Conn.);

Baker & Taylor Co. v. *U. S.,* 26 Fed. 2nd 187 (C. C. A., 2nd Cir.).

POINT I.

The Circuit Court of Appeals has not decided any question of law which is important or which is not settled by decisions of this Court.

The Circuit Court of Appeals held (1) that the basis used by the plaintiffs did not reflect their true incomes, and (2) that, since the basis used by the plaintiffs did not reflect their true incomes, their taxes should be computed upon the cash basis prescribed in Section 12 (R. pp. 262-3).

The first of these points involves merely the interpretation of the pleadings and the findings in these particular suits. It does not involve any question of law and does not affect any taxes other than those payable by the plaintiffs for 1917.

The second of these points involves merely the interpretation of Sections 12, 13(*a*) and 13(*d*) of the Revenue Act of 1917. It involves a question of law but does not affect any taxes other than those payable by the plaintiffs for 1917. This question of law is not involved in any other case arising under the Revenue Act of 1917 and it could not be involved in any case arising under the Revenue Acts for 1918 and subsequent years. There are no provisions in any of the later Revenue Acts similar to those of Sections 12, 13(*a*) and 13(*d*) of the Revenue Act of 1917.

The Revenue Act of 1918 (40 Stat. 1057, c. 18) established an entirely new scheme for determining the income and this new scheme has been used in all the later Revenue Acts.

Instead of providing that the income should be determined upon the cash basis, except in cases where the taxpayer kept his accounts and made his return upon some other basis which clearly reflected his income and complied with the Regulations, and that in such excepted cases the tax should be computed upon his income as so returned, the Revenue Acts for 1918 and subsequent years provided in substance

that the income should be determined upon the basis upon which the accounts were kept, except in cases where such basis did not clearly reflect the income, and that in such excepted cases the incomes should be determined upon such basis as, in the opinion of the Commissioner, did clearly reflect the income. These later Acts conferred upon the Commissioner the power to determine what basis clearly reflected the income of the taxpayer and to redetermine the income upon that basis. They did not limit the Commissioner to the income determined upon the cash basis or the income "as so returned". Under these later Acts there is no "statutory" basis for determining the income.

Section 233(*a*) of the Revenue Act of 1918 provided that in the case of a corporation the term "gross income" means the gross income as defined in Section 213, with certain exceptions applicable to insurance companies. Section 213 provided that the term "gross income" includes "gains, profits and income derived from * * * trades, businesses, commerce, or sales, or dealings in property, etc.".

Section 234(*a*) provided that in computing the net income of a corporation there shall be allowed as deductions "(*a*) all the ordinary and necessary expenses *paid or incurred* during the taxable year in carrying on any trade or business, etc., (2) all interest *paid or accrued* within the taxable year on its indebtedness, etc., (3) taxes *paid or accrued* within the taxable year, etc." and certain other amounts representing losses, depreciation, amortization, etc.

The last paragraph of Section 200 provided:

> "The term 'paid', for the purposes of the deductions and credits under this title, means 'paid or accrued' or 'paid or incurred', and the terms 'paid or incurred' and 'paid or accrued' shall be construed according to the method of accounting upon the basis of which the net income is computed under Section 212."

Subdivision (*b*) of Section 212, an entirely new and most important provision, was as follows:

> "(*b*) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) *in accordance*

with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made *upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect the income.*"

The Revenue Acts prior to 1918 made no reference to inventories, but the Revenue Act of 1918 provided in Section 203:

> "That whenever in the opinion of the Commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner, with the approval of the Secretary, may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income."

The later Revenue Acts contained substantially the same provisions with respect to the determination of the income and the powers of the Commissioner in connection therewith.

Revenue Act of 1921, approved Nov. 23, 1921, 42 Stat. 227 c. 136, Secs. 233(*a*), 213, 234(*a*), 200(4), 212(*b*), 203.

Revenue Act of 1924, approved June 2, 1924, 43 Stat. 253 c. 234, Secs. 233(*a*), 213, 234(*a*), 200(*d*), 212(*b*), 205.

Revenue Act of 1926, approved Feb. 26, 1926, 44 Stat. 9 c. 27, Secs. 233(*a*), 213, 234(*a*), 200(*d*), 212(*b*), 205.

Revenue Act of 1928, approved May 29, 1928, Secs. 21, 22(*a*), 23, 48(*c*), 41, 22(*c*).

The Revenue Acts for 1918 and subsequent years did not prescribe the cash basis or any other basis for determining the income, but they authorized the Commissioner to prescribe the basis upon which the income of each taxpayer should be determined. They did not give to the taxpayer the

privilege of choosing between the cash basis and his book basis, if the latter clearly reflected his income. They did not give to the taxpayer any privilege of any kind with respect to the basis. They provided that the income should be determined in each case upon the basis which clearly reflected the income of the taxpayer, without reference to the basis used by the taxpayer, and they authorized the Commissioner to determine in each case what basis would clearly reflect the income of the taxpayer.

It is obvious that the questions involved in these suits are no longer of any importance or interest to anybody other than the parties to the suits.

Furthermore, the question of law which the Circuit Court of Appeals decided in these suits has already been settled by decisions of this Court.

United States v. *Anderson,* 269 U. S. 422;
Reineke v. *Gardner,* 277 U. S. 239.

While these cases did not involve exactly the question which is involved in the suits at bar, they did involve the interpretation of Sections 12, 13(*a*), and 13(*d*) of the Revenue Act of 1917, and this Court stated in so many words that the income of every corporation should be determined upon the cash basis prescribed in Section 12, except (1) in cases where the corporation kept its accounts and made its return upon an accrual basis which clearly reflected its income and complied with the Regulations, and (2) in cases where the corporation was unable to determine its income and make its return upon the cash basis. The opinions in these cases clearly indicate that if a corporation made an erroneous return the Commissioner had no power to make any return for the corporation other than the one which the Revenue Act *required* the corporation to make, and that if a corporation was able to determine its income and make its return upon the cash basis the Revenue Act did not *require* it to make its return upon any other basis.

The cases of these plaintiffs do not fall within either o these exceptions because (1) the plaintiffs did not keep thei accounts or make their returns upon an accrual basis whic clearly reflected their incomes or complied with the Regula tions, and (2) the plaintiffs were able to determine thei incomes and make their returns upon the cash basis. Th plaintiffs proved at the trial the amounts of their income upon the cash basis and thus proved that the incomes upo which they had paid taxes were in excess of their taxabl incomes, and that the taxes which they paid were in exces of the taxes which were legally payable.

In *United States* v. *Anderson, supra,* the taxpayers kep their accounts upon an accrual basis which clearly reflecte their incomes, but they did not make their returns in accord ance with their books of account. The Commissioner change the returns so as to make them accord with the books an assessed additional taxes which the taxpayers paid. Thi Court held that the taxpayers were not entitled to recove the amounts so paid, because they were not able to determin their incomes or make their returns upon the cash basis an hence were required to make their returns upon the basi of their books. The taxpayers in this case did not clai or prove that their incomes as determined by the Commis sioner were in excess of their incomes upon the cash basi or that the taxes which they had paid were in excess of th taxes which were legally payable.

The situation of these plaintiffs is just the opposite o the situation of the taxpayers in the *Anderson* case. The only alternative open to the taxpayers in the *Anderson* case was to use the basis of their books because (1) they were not able to use the cash basis, and (2) the basis of their books clearly reflected their incomes and complied with the Regulations. The only alternative open to the plaintiffs in the suits at bar was to use the cash basis because (1) they were able to use the cash basis, and (2) the basis of their books did not clearly reflect their incomes or comply with the Regulations.

In *Reinecke* v. *Gardner, supra,* this Court held that the question whether a taxpayer should deduct interest accrued in 1916 but paid in 1917 from his gross income for 1916 or his gross income for 1917 could not be answered, because the record did not show whether the books of the taxpayer reflected his income and did not show on what basis his return was made. The record did show that the taxpayer was carrying on the business of a coal mining corporation and keeping his books upon an accrual basis. This Court said in substance that the taxpayer was required to make his return upon the cash basis unless he kept his books on an accrual basis which accurately reflected his income and actually made his return on that basis (pp. 244-5).

POINT II.

The decision of the Circuit Court of Appeals for the Sixth Circuit in *Aluminum Castings Company* v. *Routzahn* furnishes no basis for the issue of writs of certiorari.

In *Aluminum Castings Company* v. *Routzahn,* 31 Fed. 2nd 699, the corporation kept its accounts and made its return upon an accrual basis, except that it deducted its munitions tax in 1917, the year in which it was paid, instead of 1916, the year in which it accrued. The Commissioner ruled that the munitions tax should be deducted in 1916 instead of 1917 and assessed an additional tax for 1917 which the corporation paid. It was held that the corporation was not entitled to recover the amount so paid. The corporation did not prove the amount of its income upon the cash basis prescribed in Section 12, but claimed that its return was correct because it was made in accordance with the Regulations issued under the Revenue Act of 1913, which permitted returns upon an accrual basis, except for taxes, and permitted the deduction of taxes in the year in which they were paid. All the Court had to

decide was that such Regulations were not valid under the Revenue Act of 1917, as this Court had already decided in *United States* v. *Anderson,* 269 U. S. 422.

As the corporation did not prove the amount of its income upon the cash basis prescribed in Section 12, it was in no position to claim that its taxes should be computed upon that basis. The burden rested upon the corporation to prove that the taxes which it had paid were in excess of the taxes which were legally payable.

United States v. *Anderson,* 269 U. S. 422, 443;
Botany Worsted Mills v. *United States* (Jan. 21, 1929), 49 Sup. Ct. Rep. 129;
Bishoff v. *Commissioner,* 27 Fed. 2nd 91 (C. C. A. 3rd Cir.);
Rouss v. *Bowers,* 30 Fed. 2nd 628 (C. C. A. 2nd Cir.).

The question which the Circuit Court of Appeals decided in the suits at bar was not presented, considered or decided in *Aluminum Castings Company* v. *Routzahn.*

POINT III.

The decision of the District Court for the Southern District of New York in *American Can Company* v. *Bowers* furnishes no basis for the issue of writs of certiorari.

The above proposition is true not only because a conflict between a District Court and a Circuit Court of Appeals furnishes no basis for the issue of a writ of certiorari, but also because there is no conflict upon any question of law between the decision of the District Court in *American Can Company* v. *Bowers* and the decision of the Circuit Court of Appeals in the suits at bar.

In *American Can Company* v. *Bowers* the District Court held that the real question was whether the Commissioner

had rejected the basis upon which the plaintiffs kept their accounts and made their returns, recognizing clearly that if the Commissioner had rejected their basis the taxes of the plaintiffs should be computed upon the cash basis (Petition for certiorari, p. 31). He held further that the Commissioner must accept the basis upon which the plaintiffs kept their accounts and made their returns or, in the alternative, require them to file on the cash basis, and that he could not compel the plaintiffs to change their basis other than to the cash basis, but he held that the Commissioner had power to adjust items in accordance with the basis used by the plaintiffs and that the Commissioner did not disturb the "basic theory" upon which the plaintiffs had kept their accounts but merely disallowed as a deduction an item which was shown on their books (Petition for certiorari, p. 33).

It is clear that if the opinion of the District Court were applied to the record in the suits at bar the result would be in favor of the plaintiffs. The pleadings and the findings in the suits at bar establish conclusively that the basis used by the plaintiffs did not clearly reflect their incomes or comply with the Regulations, that the Commissioner rejected their basis and that the changes made by the Commissioner were not in accordance with their basis. Upon such pleadings and findings the District Court would have held that the taxes of the plaintiffs should be computed upon the cash basis and that the plaintiffs were entitled to recover.

The New York suits were tried by the Court and a jury. The Court made no findings of fact but merely directed verdicts in favor of the defendant. The record made by the pleadings and the evidence is entirely different from the record made by the pleadings and findings in the suits at bar. We are satisfied, however, that the verdicts in the New York suits are contrary to the evidence and contrary to law and that they will be reversed by the Circuit Court of Appeals for the Second Circuit to which appeals have been taken. It is expected that these appeals will be argued next fall.

The opinion of the District Court does not state correctly the contentions which the plaintiffs made, and we contend

that it does not state correctly the questions involved or interpret correctly the provisions of the Revenue Act or the decision of this Court in *United States* v. *Anderson*.

The plaintiffs have never contended that their taxes should be computed upon their incomes "as so returned". They contended in the New York suits that the Commissioner had no power to assess taxes under the Revenue Act of 1917 upon anything other than the income "as so returned" or the income on the cash basis, and that he had no power to redetermine the incomes of the plaintiffs upon any basis other than the cash basis. They admitted that the Commissioner was not bound to accept the returns which they made, but contended that he had no power to make any returns for them other than those which the Revenue Act required them to make, that is, returns upon the cash basis. They contended that the Commissioner had no power to adjust items in accordance with their basis, that the changes which he made were in conflict with their basis, and that he had used a basis which was not authorized by the Revenue Act.

The contentions which the plaintiffs made in the New York suits were not based upon the claim that the Commissioner had rejected their basis or had done anything which would entitle them to file returns upon the cash basis. Their contentions were based throughout upon the Revenue Act and the facts, and the claim that the Commissioner had no power under the Revenue Act to assess the taxes involved in those suits.

The opinion of the District Court deals almost entirely with questions which were not presented, considered or decided in the suits at bar, and there is no point in making any argument about those questions here. The important fact is that there is no conflict upon any question of law between the opinion of the District Court and the opinion of the Circuit Court of Appeals in the suits at bar. The opinion of the District Court is in accord with, and tends to confirm, the decision of the Circuit Court of Appeals upon the only question of law which it decided.

POINT IV.

The decision of this Court in *Doyle* v. *Mitchell Brothers* furnishes no basis for the issue of writs of certiorari.

The statements in the petition with reference to the decision of this Court in *Doyle* v. *Mitchell Brothers*, 247 U. S. 179 are inaccurate and misleading, to say the least (Petition for certiorari, pp. 7, 20). This Court did not hold or say that inventories should be used when the income is determined upon the cash basis, and it did not hold or say anything with respect to the determination of the income of a manufacturing corporation upon the cash basis prescribed in Section 12.

In *Doyle* v. *Mitchell Brothers*, which arose under the Revenue Act of 1909, this Court held that the sale of *capital assets* did not produce income of any kind unless the sale resulted in a profit and that the entire proceeds of the sale of capital assets could not under any circumstances be treated as income, and further, that in order to determine the amount of the profit realized from the sale of the capital assets involved in that case, it was necessary to deduct from the proceeds of the sale the market value of the assets on December 31, 1908, the time when the Revenue Act took effect. The Government contended (1) that the entire proceeds of the sale of the capital assets were income and that the taxpayer had no right to deduct anything therefrom, and (2) that if the taxpayer had the right to deduct anything from the proceeds of the sale it had the right to deduct only the original cost, which was less than the market value on December 31, 1908. In rejecting these contentions, this Court referred to the Regulations which the Commissioner had issued with respect to the determination of the income of manufacturing companies and also the determination of the income realized through the sale of *capital assets*, and said: "In our opinion these Regulations correctly interpret the Act in its applica-

tion to the facts in the present case" (247 U. S. 185-7). This Court did not say that the gross income of manufacturing companies should consist of the difference between the price received for the goods as sold and the cost of such goods as manufactured, such cost to be ascertained by the use of inventories, but it merely said that the Regulations issued by the Commissioner so provided (247 U. S. 185-6). The statement on page 20 of the petition as to what this Court said in the *Doyle* case is not correct. This Court did not adopt or approve the Regulations in so far as they related to the determination of the income of a manufacturing company. It merely adopted and approved them in so far as they related to the determination of the income realized through the sale of *capital assets.*

There is no warrant whatever for the claim that inventories should be used when the income is determined upon the cash basis prescribed in Section 12, for the plain and simple reason that Section 12 makes no reference to inventories. Nor is there any warrant for the claim that the amounts which the Court found to be the incomes of the plaintiffs upon the cash basis were not determined in accordance with Section 12.

Section 12 requires and permits the use of only five factors in determining the amount of the net income (1) the gross amount of the income *received within the year,* (2) the amount of the ordinary and necessary expenses of maintenance and operation *paid within the year,* (3) the amount of the losses actually *sustained and charged off within the year,* (4) the amount of the interest on indebtedness *paid within the year,* and (5) the amount of the taxes *paid within the year.* The net income is ascertained under this Section by deducting the last four factors from the first factor.

The findings and the evidence show separately for each Company, and in the aggregate for all the Companies, the amount of each one of these five factors and that each factor includes the items and only the items which are included in the definition of the factor contained in Section 12. There is no ground for claiming that the amounts given for gross

income fail to include any item which ought to have been included or that the amounts given for the deductions include any item which ought not to have been included. The findings and the evidence show also the amount of the net income of each Company and the consolidated net income of all the Companies upon the cash basis prescribed in Section 12 (R. pp. 176-80, 212-3, 247-8, 61-8, 74-8, 128-46, 151-2).

When the plaintiffs offered in evidence their computation of their incomes upon the cash basis, the defendant asked for an opportunity to examine the books and records of the plaintiffs with a view to checking the correctness of their computation. The plaintiffs did not oppose this application and the Court adjourned the trial for several weeks in order to allow the defendant to check the computation. When the trial was resumed the defendant conceded the figures in the plaintiffs' computation, except for two items which the plaintiffs corrected. There was, accordingly, no dispute about the figures and the defendant is in no position to question the amounts which the Court found to be the incomes of the plaintiffs upon the cash basis (R. pp. 61-9, 74-8, 128-46, 151-2).

It is well settled that when the income is determined upon the cash basis no items should be used or taken into consideration other than items of cash actually received within the year, items of cash actually paid within the year and losses actually sustained within the year.

Maryland Casualty Co. v. *U. S.*, 251 U. S. 342;

U. S. v. *Anderson*, 269 U. S. 422;

United States v. *Mitchell*, 271 U. S. 9;

Mutual Benefit Ins. Co. v. *Herold*, 198 Fed. Rep. 199 (D. C. N. J. 1912); 201 Fed. Rep. 918 (C. C. A. 3rd Cir.);

Connecticut General Life Insurance Co. v. *Eaton*, and *Connecticut Mutual Insurance Co.* v. *Eaton*, 218 Fed. Rep. 188, 206 (D. C. Conn.); affirmed on appeal, 223 Fed. Rep. 1022 (C. C. A. 2nd Cir.);

Edwards v. *Keith*, 231 Fed. Rep. 110 (C. C. A. 2nd Cir.);

U. S. v. *Christine Oil & Gas Co.*, 269 Fed. Rep. 458 (D. C. La.);

Lumber Mutual Fire Insurance Co. v. *Malley*, 256 Fed. Rep. 380 (D. C. Mass.);

Coley v. *Pickering*, 21 Fed. 2nd 247 (Dist. Ct. S. D. Ill.) 1927;

American Can Co. v. *Bowers*, (D. C. N. Y.) (Petition for certiorari, p. 36);

Aluminum Castings Co. v. *Routzahn*, 24 Fed. 2nd 230 (D. C. Ohio); 31 Fed. 2nd 669 (C. C. A. 6th Cir.).

The defendant's real objection to the amounts which the Court found to be the incomes of the plainitffs upon the cash basis prescribed in Section 12 is that they do not reflect the true incomes of the plaintiffs, rather than that they were not determined in accordance with Section 12 of the Revenue Act (Petition for certiorari, pp. 5, 8, 20, 22). The defendant's objection amounts merely to the claim that the cash basis prescribed in Section 12 does not reflect the true income of a manufacturing corporation and, for that reason, should not be used, even though Congress directed that it should be used for the purpose of the taxes for 1917. The defendant is not attempting to apply the Revenue Act but is attempting rather to avoid it.

It is obvious that the defendant is in no position to attack the Revenue Act, and that the Commissioner had no power to assess taxes, except in accordance with the Revenue Act.

POINT V.

The petition for writs of certiorari should be denied.

GRAHAM SUMNER,
JOHN J. TREACY,
Counsel for Plaintiffs-Respondents.